Ong Teik Beng (t/a MJVConstruction) v Wow Hotel Sdn Bhd and another case

HIGH COURT (PENANG) — ORIGINATING SUMMONS NOS PA-24C-4–06 OF 2020 AND PA-24C-7–11 OF 2020
AMARJEET SINGH JC
27 AUGUST 2021

Civil Procedure — Application — Application to set aside adjudication determination — Whether there was denial of natural justice — Whether there was a construction contract — Whether quotation a written contract — Whether value of work proven — Whether adjudicator acted independently and impartially — Whether adjudicator displayed bias — Whether adjudicator exceeded jurisdiction — Whether adjudication decision should be stayed — Whether defendant established clear and manifest error in the adjudication decision — Whether order to enforce adjudication decision should be granted — Construction Industry Payment and Adjudication Act 2012 ss 15 & 16

The present matter concerned two originating summonses that arose from an adjudication decision dated 28 April 2020 made under the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA'). The first Originating Summons No PA-24C-4–06 of 2020 was filed on 23 June 2020 by Ong Teik Beng trading as MJV Construction ('the plaintiff') under s 28 of the CIPAA for an order to enforce the adjudication decision against Wow Hotel Sdn Bhd ('the defendant') as if it was a judgment or order of the High Court ('OS 4'). The second Originating Summons No PA-24C-7–11 of 2020 was filed on 10 November 2020 by the defendant under s 15 of the CIPAA for an order to set aside the adjudication decision on the grounds of being denied natural justice and that the adjudicator acted in excess of jurisdiction ('OS 7' or). On the same day the defendant applied to stay the award under s 16 of the CIPAA pending the disposal of OS 7 and/or Butterworth Sessions Court Civil Action No B52C-1–08 of 2020 ('encl 3'). In the latter action the defendant was claiming against the plaintiff damages primarily as a result of 'late completion of works' and 'defective works' in respect of the work that was done and completed. It was not in dispute that the defendant appointed the plaintiff as its contractor to carry out renovation works on four floors of a building in George Town, Penang. There was no formal agreement and the works were carried out premised on a work quotation dated 26 April 2019. There were subsequently further instructions for variation works. Payments were made by the defendant pursuant to invoices issued by the plaintiff for the works done. The defendant had made ten part payments towards the work done and subsequently failed to make payments on the remaining invoices that were issued for works done and completed. As a result of the failure, the plaintiff on

14 October 2019 issued a payment claim under the CIPAA to the defendant. The defendant filed its payment response and subsequently its adjudication response to the adjudication claim. On 26 February 2020, the pleadings were closed with an adjudication reply. Thereafter, on 28 April 2020, the adjudicator awarded in favour of the plaintiff the followings amounts: (a) RM604,060.10 as the principal sum owed; (b) interest; (c) costs of the proceedings; (d) adjudicator's fees; and (e) Asian International Arbitration Centre's ('AIAC') administrative fees. The defendant did not pay the adjudication sum within the time stipulated in the adjudication decision, that is to say, on or before 12 May 2020. The refusal to pay resulted in the plaintiff filing OS 4 to enforce the adjudication decision which was followed about almost six months later with the defendant filing OS 7 to set aside the adjudication decision and followed up with the application for stay. All three applications were heard together with OS 7 and the application for stay being determined first, followed by OS 4. The application to set aside was anchored on two grounds: (i) a denial of natural justice; and (ii) that the adjudicator had acted in excess of his jurisdiction.

Held, allowing the plaintiff's application ('OS 4') with costs; dismissing the defendant's applications to stay ('encl 3') and set aside the adjudication decision ('OS 7') with costs:

(1) The learned judicial commissioner was of the view that the contention of the defendant that at best there the quotation was unilaterally issued by the plaintiff was untenable as it was not in accord with the reality of things in the ordinary course of business. The quotation had identified in detail the works that were to be carried out. The works were 'renovations' works. Only the person seeking to renovate knew what was to be restored, refurbished, repaired or changed or other works by way of renovation. The quotation therefore could not exist in vacuity. It could only be based on what the defendant wanted done and was evidence of a meeting of the minds. The existence of the quotation was not in dispute and it was irrelevant that the defendant did not countersign the quotation. The facts show that the plaintiff did the works and part payments were made on invoices issued based on the quotation. The court was further supported by the High Court cases where it was opined that the words 'contract in writing' should be accorded a liberal meaning and should not be restricted to a 'formal' contract (see paras 14–15).

(2) The court was of the view that the complaint made by the defendant did not fall within the meaning of a denial of natural justice. There was no allegation of not being accorded procedural fairness but in essence there was an allegation of erroneous assessment of documentary evidence. The court found that the adjudicator had considered the material before him, asked the right questions and arrived at findings that in the end concluded the matter in favour of the plaintiff. The defendant's

complaint that the invoices did not correspond with the quotation and that there was no evidence that the value of work done was proven were in essence questioning the correctness or merits of the adjudicator's findings. What the defendant was asking was for the court to exercise its appellate jurisdiction and to hold that the adjudicator erred by not adhering to s 101 of the Evidence Act 1950 in the face of sub-s 12(9) of the CIPAA which clearly stated that the Evidence Act 1950 did not apply to adjudication proceedings. The cases cited by the defendant were distinguishable because they were not decided based on the provisions of the CIPAA. The complaint was therefore without merit (see para 17).

(3) It was clear that the statement was not a finding of fact as claimed by the defendant but merely a finding that there was a dispute between the parties concerning quality of work. The adjudicator said that the evidence adduced by the defendant to establish the allegation of defective works was not from an independent third party but by the accountant of the defendant. The decision was based on the adjudicator's reading and the weight to be attached to a self-serving report. At paras 62–64, the adjudicator said that the dispute was not proven. The adjudicator had therefore considered the documents and made his findings. The court would be exercising appellate powers if such findings of the adjudicator were to be disturbed. The complaint was therefore without merit (see para 19).

(4) The court was of the view that the mere fact that the adjudicator had decided an issue could not justify a conclusion of bias, be it apparent bias or a real danger of bias. Something more was required. In the instant case, the adjudicator had considered the facts and made a decision that was not in favour of the defendant. The defendant might disagree with the adjudicator and even be convinced that the adjudication decision was wrong but that was no justification for accusing the adjudicator of having failed to act independently and impartially (see paras 20–21).

(5) The defendant had failed to establish a clear and manifest error in the adjudication decision. The alleged errors were substantially made up of the defendant's dissatisfaction towards the manner the adjudicator weighed the evidence and made his findings. The defendant had also failed to demonstrate that the plaintiff was in no position to return the money in the event the defendant was successful in its civil suit (see para 25).

(6) There was no dispute that an adjudication decision has been rendered in the plaintiff's favour and that the defendant had not paid the adjudication sum within the period stipulated in the adjudication decision. Further, with the dismissal of the application to set aside the adjudication decision there was also no prohibition to grant the order sought (see para 28).

[Bahasa Malaysia summary

Perkara semasa melibatkan dua saman pemula yang berbangkit daripada keputusan adjudikasi bertarikh 28 April 2020 yang dibuat di bawah Akta Pembayaran dan Adjudikasi Industri Pembinaan 2012 ('APAIP'). Saman pemula pertama No PA-24C-4–06 Tahun 2020 telah difailkan pada 23 Jun 2020 oleh Ong Teik Beng yang berniaga sebagai MJV Construction ('plaintif') di bawah s 28 APAIP untuk satu perintah menguatkuasakan keputusan adjudikasi terhadap Wow Hotel Sdn Bhd ('defendan') seolah-olah ia adalah penghakiman atau perintah Mahkamah Tinggi ('OS 4'). Saman pemula kedua No PA-24C-7–11 Tahun 2020 telah difailkan pada 10 November 2020 oleh defendan di bawah s 15 APAIP untuk satu perintah bagi mengetepikan keputusan adjudikasi atas alasan bahawa dinafikan keadilan semula jadi dan adjudikator telah bertindak melebihi bidang kuasa ('OS 7'). Pada hari yang sama defendan memohon untuk menggantung award di bawah s 16 APAIP sementara menunggu pelupusan OS 7 dan/atau Tindakan Sivil Mahkamah Sesyen Butterworth No B52C-1–08 Tahun 2020 ('lampiran 3'). Dalam tindakan berikutnya defendan menuntut ganti rugi terhadap plaintif terutamanya akibat 'kerja yang lewat disiapkan' dan 'kerja cacat' berkenaan dengan kerja yang telah dijalankan dan disiapkan. Ia tidak dipertikaikan bahawa defendan melantik plaintif sebagai kontraktornya untuk menjalankan kerja-kerja pengubahsuaian di empat tingkat sebuah bangunan di George Town, Pulau Pinang. Tiada perjanjian rasmi dan kerja-kerja tersebut dilaksanakan berdasarkan sebut harga kerja bertarikh 26 April 2019. Terdapat arahan lanjut untuk kerja-kerja pengubahan. Pembayaran telah dibuat oleh defendan menurut invois yang dikeluarkan oleh plaintif untuk kerja yang dijalankan. Defendan telah membuat sepuluh bahagian pembayaran terhadap kerja yang telah dijalankan dan seterusnya gagal membuat pembayaran ke atas baki invois yang dikeluarkan untuk kerja yang telah dijalankan dan disiapkan. Akibat kegagalan tersebut, plaintif pada 14 Oktober 2019 telah mengeluarkan tuntutan pembayaran di bawah APAIP kepada defendan. Defendan memfailkan jawapan pembayarannya dan seterusnya jawapan adjudikasinya kepada tuntutan adjudikasi. Pada 26 Februari 2020, pliding telah ditutup dengan jawapan adjudikasi. Seterusnya, pada 28 April 2020, adjudikator membenarkan award berpihak kepada plaintif dalam amaun berikut: (a) RM604,060.10 sebagai jumlah pokok terhutang; (b) faedah; (c) kos prosiding; (d) fi adjudikator; dan (e) fi pentadbiran Pusat Timbang Tara Antarabangsa Asia ('AIAC'). Defendan tidak membayar jumlah adjudikasi dalam masa yang ditetapkan dalam keputusan adjudikasi, iaitu pada atau sebelum 12 Mei 2020. Keengganan pembayaran menyebabkan plaintif memfailkan OS 4 untuk menguatkuasakan keputusan adjudikasi yang diikuti kira-kira hampir enam bulan kemudian dengan defendan memfailkan OS 7 untuk mengetepikan keputusan adjudikasi dan dengan seterusnya permohonan penggantungan. Ketiga-tiga permohonan telah didengar bersama-sama dengan OS 7 dan permohonan untuk penggantungan

ditentukan terlebih dahulu, diikuti oleh OS 4. Permohonan untuk mengetepikan berlandaskan atas dua alasan: (i) penafian keadilan semula jadi; dan (ii) bahawa adjudikator telah bertindak melebihi bidang kuasanya.

Diputuskan, membenarkan permohonan plaintif ('OS 4') dengan kos; menolak permohonan defendan bagi penggantungan ('lampiran 3') dan mengetepikan keputusan adjudikasi ('OS 7') dengan kos:

(1) Pesuruhjaya kehakiman yang bijaksana berpandangan bahawa penghujahan defendan bahawa 'at best there the quotation was unilaterally issued by the plaintiff' adalah tidak boleh dipertahankan kerana ia tidak mengikut realiti perkara dalam perjalanan biasa perniagaan. Sebut harga tersebut telah mengenal pasti secara terperinci kerja-kerja yang akan dijalankan. Kerja-kerja tersebut adalah kerja-kerja 'ubah suai'. Hanya orang yang ingin mengubah suai tahu perkara yang perlu dipulihkan, diperbaharui, dibaiki atau diubah atau kerja-kerja lain berdasarkan pengubahsuaian. Oleh itu, sebut harga tidak boleh wujud secara kosong. Ia adalah berdasarkan apa yang defendan mahu lakukan dan merupakan bukti pertemuan minda. Kewujudan sebut harga tersebut tidak dipertikaikan dan adalah tidak relevan bahawa defendan tidak menandatangani balik sebut harga tersebut. Fakta menunjukkan bahawa plaintif melakukan kerja-kerja dan sebahagian pembayaran dibuat atas invois yang dikeluarkan berdasarkan sebut harga tersebut. Mahkamah turut disokong oleh kes-kes Mahkamah Tinggi di mana ia berpendapat bahawa perkataan 'kontrak secara bertulis' harus diberi makna yang liberal dan tidak boleh dihadkan kepada kontrak 'formal' (lihat perenggan 14–15).

(2) Mahkamah berpendapat bahawa aduan yang dibuat oleh defendan tidak termasuk dalam pengertian penafian keadilan semula jadi. Tiada dakwaan tidak diberikan keadilan prosedur tetapi pada dasarnya terdapat dakwaan penilaian yang salah terhadap keterangan dokumentari. Mahkamah mendapati bahawa adjudikator telah mempertimbangkan bahan di hadapannya, bertanya soalan yang betul dan membuat dapatan yang akhirnya dengan menyimpulkan perkara tersebut berpihak kepada plaintif. Aduan defendan bahawa invois tidak sepadan dengan sebut harga dan tiada bukti bahawa nilai kerja yang dilakukan telah dibuktikan pada dasarnya mempersoalkan ketepatan atau merit dapatan adjudikator. Apa yang diminta oleh defendan adalah supaya mahkamah menjalankan bidang kuasa rayuannya dan memutuskan bahawa adjudikator telah terkhilaf dengan tidak mematuhi s 101 Akta Keterangan 1950 berlawanan dengan sub-s 12(9) APAIP yang jelas menyatakan bahawa Akta Keterangan 1950 tidak terpakai untuk prosiding adjudikasi. Kes-kes yang dipetik oleh defendan boleh dibezakan kerana ia tidak diputuskan berdasarkan peruntukan APAIP. Oleh itu aduan iadalah tanpa merit (lihat perenggan 17).

(3) Ia adalah jelas bahawa kenyataan tersebut bukanlah satu dapatan fakta seperti yang didakwa oleh defendan tetapi hanya satu dapatan bahawa terdapat pertikaian antara pihak-pihak berkenaan kualiti kerja. Adjudikator menyatakan bahawa keterangan yang dikemukakan oleh defendan untuk membuktikan dakwaan kerja cacat bukan daripada pihak ketiga yang bebas tetapi oleh akauntan defendan. Keputusan tersebut adalah berdasarkan bacaan adjudikator dan berat yang perlu diterapkan pada laporan kediri. Pada perenggan 62–64, adjudikator mengatakan bahawa pertikaian tersebut tidak dibuktikan. Oleh itu, adjudikator telah mempertimbangkan dokumen dan membuat dapatannya. Mahkamah akan mengguna pakai kuasa rayuan sekiranya dapatan adjudikator tersebut diganggu. Oleh itu aduan adalah tanpa merit (lihat perenggan 19).

(4) Mahkamah berpendapat bahawa fakta bahawa adjudikator telah memutuskan sesuatu isu tidak boleh memberikan justifikasi kesimpulan berat sebelah, sama ada berat sebelah yang jelas atau bahaya berat sebelah yang sebenar. Sesuatu lagi diperlukan. Dalam kes semasa, adjudikator telah mempertimbangkan fakta dan membuat keputusan yang tidak memihak kepada defendan. Defendan mungkin tidak bersetuju dengan adjudikator dan malah yakin bahawa keputusan adjudikasi tersebut salah tetapi ia bukan justifikasi untuk menuduh adjudikator gagal bertindak secara bebas dan saksama (lihat perenggan 20–21).

(5) Defendan telah gagal untuk membuktikan kesilapan yang jelas dan nyata dalam keputusan adjudikasi. Kesilapan yang didakwa sebahagian besarnya terdiri daripada rasa tidak puas hati defendan terhadap cara adjudikator menimbang bukti dan membuat dapatannya. Defendan juga telah gagal untuk menunjukkan bahawa plaintif tidak mempunyai kedudukan untuk memulangkan wang sekiranya defendan berjaya dalam tindakan sivilnya (lihat perenggan 25).

(6) Tiada pertikaian bahawa keputusan adjudikasi telah diberikan berpihak kepada plaintif dan defendan tidak membayar jumlah adjudikasi dalam tempoh yang ditetapkan dalam keputusan adjudikasi. Selanjutnya, dengan penolakan permohonan untuk mengenepikan keputusan adjudikasi juga tiada larangan untuk memberikan perintah yang diminta (lihat perenggan 28).]

Cases referred to

ACFM Engineering & Construction Sdn Bhd v Esstar Vision Sdn Bhd and another appeal [2016] MLJU 1776; [2016] 1 LNS 1522, CA (folld)

Hart Investments Ltd v Fidler & Anor [2006] EWHC 2857 (TCC), QBD (refd)

Inai Kiara Sdn Bhd v Puteri Nusantara Sdn Bhd [2019] 2 MLJ 362; [2019] 2 CLJ 229, CA (refd)

Inovatif Engineering (M) Sdn Bhd v Nomad Engineering Sdn Bhd [2016] MLJU 1351; [2017] 1 AMR 722, HC (refd)
Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd and another appeal [2020] 6 MLJ 224; [2019] 8 CLJ 433, FC (refd)
Mott Macdonald Ltd v London & Regional Properties Ltd [2007] EWHC 1055 (TCC), QBD (refd)
Nanyang Development (1966) Sdn Bhd v How Swee Poh [1970] 1 MLJ 145, FC (refd)
Poly Ritz Ventures Sdn Bhd v Westland Resources Sdn Bhd [2020] MLJU 2016, HC (refd)
RJT Consulting Engineers Ltd v DM Engineering (Northern Ireland) Ltd [2002] EWCA Civ 270, CA (refd)
Subang Skypark Sdn Bhd v Arcradius Sdn Bhd [2015] 11 MLJ 818; [2015] 10 CLJ 801, HC (refd)
Tan Sri Dato' Prof Dr Lim Kok Wing & Anor v ATSA Architects Sdn Bhd [2017] 8 MLJ 212, HC (refd)
Telekom Malaysia Bhd v KLK Electronic Sdn Bhd [2019] 4 MLJ 631, CA (refd)
View Esteem Sdn Bhd v Bina Puri Holdings Berhad [2018] 2 MLJ 22, FC (refd)

Legislation referred to

Construction Industry Payment and Adjudication Act 2012 ss 2, 12(9), 15, 15(b), (d), 16, 28
Evidence Act 1950 s 101

Ong Yu Shin (Lim Wooi Ying and Fam Han En with him) (The Chambers of Yu Shin Ong) in Originating Summons No PA-24C-4–06 of 2020 for the plaintiff.
Tan Chong Lii (Tan Lih Choon with him) (Tan Chong Lii & Co) in Originating Summons No PA-24C-7–11 of 2020 for the plaintiff.
Tan Chong Lii (Tan Lih Choon with him) (Tan Chong Lii & Co) in Originating Summons No PA-24C-4–06 of 2020 for the defendant.
Ong Yu Shin (Lim Wooi Ying and Fam Han En with him) (The Chambers of Yu Shin Ong) in Originating Summons No PA-24C-7–11 of 2020 for the defendant.

Amarjeet Singh JC:

INTRODUCTION

[1] This judgment concerns two originating summonses that arose from an adjudication decision dated 28 April 2020 made under the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA').

[2] The first originating summons PA-24C-4–06 of 2020 was filed on 23 June 2020 by Ong Teik Beng trading as MJV Construction ('the plaintiff') under s 28 of the CIPAA for an order to enforce the adjudication decision

against Wow Hotel Sdn Bhd ('the defendant') as if it is a judgment or order of the High Court ('OS 4' or 'the application to enforce the adjudication decision').

[3] The second Originating Summons PA-24C-7–11 of 2020 was filed on 10 November 2020 by the defendant under s 15 of the CIPAA for an order to set aside the adjudication decision on the grounds of being denied natural justice and that the adjudicator acted in excess of jurisdiction ('OS 7' or 'the application to set aside the adjudication decision'). On the same day the defendant applied to stay the award under s 16 of the CIPAA pending the disposal of OS 7 and/or Butterworth Sessions Court Civil Action B52C-1–08 of 2020 (encl 3). In the latter action the defendant was claiming against the plaintiff damages primarily as a result of 'late completion of works' and 'defective works' in respect of the work that was done and completed.

[4] On 4 June 2021, I dismissed the defendant's application to set aside the adjudication decision, the application to stay the adjudication decision and allowed the plaintiff's application to enforce the adjudication decision as a judgment of the High Court. This judgment contains the reasons for the said decisions.

BACKGROUND FACTS

[5] It is not in dispute that the defendant appointed the plaintiff as its contractor to carry out renovation works on four floors of a building bearing the address of No 406, Jalan Penang, George Town, Penang. There was no formal agreement and the works were carried out premised on a work quotation dated 26 April 2019. There were subsequently further instructions for variation works. Payments were made by the defendant pursuant to invoices issued by the plaintiff for the works done. The defendant had made ten part payments towards the work done and subsequently failed to make payments on the remaining invoices that were issued for works done and completed.

[6] As a result of the failure, the plaintiff on 14 October 2019 issued a payment claim under the CIPAA to the defendant. The defendant filed its payment response and subsequently its adjudication response to the adjudication claim. On 26 February 2020 the pleadings were closed with an adjudication reply. Thereafter on 28 April 2020 the adjudicator awarded in favour of the plaintiff the followings amounts: (a) RM604,060.10 as the principal sum owed; (b) interest; (c) costs of the proceedings; (d) adjudicator's fees; and (e) AIAC's administrative fees.

[7] The defendant did not pay the adjudication sum within the time stipulated in the adjudication decision, that is to say, on or before 12 May

2020. The refusal to pay resulted in the plaintiff filing OS 4 to enforce the adjudication decision which was followed about almost six months later with the defendant filing OS 7 to set aside the adjudication decision and followed up with the application for stay. All three applications were heard together with OS 7 and the application for stay being determined first followed with OS 4.

OS 7: SETTING ASIDE THE ADJUDICATION DECISION

[8] The application to set aside was anchored on two grounds: (a) a denial of natural justice; and (b) that the adjudicator had acted in excess of his jurisdiction. Both these grounds are statutorily provided in s 15(b) and (d) of the CIPAA respectively as grounds to set aside an adjudication decision.

The relevant principles

[9] In determining the matter, I kept in mind the intention behind the enacting of the CIPAA and the relevant principles. CIPAA was designed for a speedy disposal for construction matters with the intention that the adjudicator's decision is merely interim in nature or of 'temporary finality' only. The adjudication scheme therefore involves a significant degree of informality. The court is not to revisit the factual or legal matters canvassed before the adjudicator. As such the right of an aggrieved party the challenge the adjudication decision is limited only to the four fundamental grounds of a fair hearing provided in s 15 of the CIPAA. The CIPAA does not provide an aggrieved party with the right of an appeal and therefore the court is not permitted to exercise appellate powers to review the adjudicator's decision on its merits. Thus, the court must be careful not to venture outside the jurisdictional sphere when determining a matter under s 15 of the CIPAA. (*Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd and another appeal* [2020] 6 MLJ 224; [2019] 8 CLJ 433).

[10] In this regard the decision of the Court of Appeal in *ACFM Engineering & Construction Sdn Bhd v Esstar Vision Sdn Bhd and another appeal* [2016] MLJU 1776; [2016] 1 LNS 1522 is instructive. There it was stated as follows:

> [19] When one speaks of natural justice, it is nothing more than what we call the concept of 'procedural fairness' which needs to be accorded to the parties in a dispute of a hearing ...
>
> [21] ... In the context of s 15 of CIPAA 2012, it cannot be the function of the court to look into or review the merits of the case or to decide the facts of the case. The facts are for the adjudicator to assess and decide on. The court's function is simply to look at the manner at which the adjudicator conducted the hearing and whether he had committed an error of law during that process. Such error of law relates to whether he had accorded procedural fairness to the appellant. In the context of this case, the complaints of the appellant were nothing but complaints of factual findings of the adjudicator which in our view cannot be entertained by us ...

A [24] ... The law as it exists now correctly limits the court's functions which expressly do not include to review the correctness of the adjudicator's decision. As pointed by the learned judge, the court's intervention is only in very exceptional circumstances which are far and few in between. The prima facie view of the court must be to affirm the adjudicator's decision unless the losing party can show that it had
B complied with the thresholds listed in s 15 of CIPAA 2012.

[11] I will now address each reason and arguments advanced by the applicant in its written submissions.

C *First reason: No construction contract within meaning of CIPAA*

[12] This reason is based on the 'excess of jurisdiction' ground. It is asserted by the defendant that there was no construction contract as defined by s 2 of the CIPAA entered into by the parties. It is claimed that the quotation relied by
D the plaintiff has not been mutually agreed and that therefore there is no written agreement between the parties which is based on the established elements of offer and acceptance. The record between the parties was not a complete agreement. Reliance was made on the United Kingdom cases of *RJT Consulting*
E *Engineers Ltd v DM Engineering (Northern Ireland) Ltd* [2002] EWCA Civ 270; *Hart Investments Ltd v Fidler & Anor* [2006] EWHC 2857 (TCC); and *Mott Macdonald Ltd v London & Regional Properties Ltd* [2007] EWHC 1055 (TCC).

F **[13]** In this regard the adjudicator had stated that the 'the actual existence of the quotation' satisfies the requirement of an exchange of communication in writing had taken place between the parties and because the defendant had allowed the plaintiff to proceed with work and had made part payment for work done the defendant is estopped from denying the existence of the
G quotation being a written contract.

[14] I am of the view that the contention of the applicant that *at best there the quotation was unilaterally issued by the plaintiff* is untenable as it is not in accord with the reality of things in the ordinary course of business. The quotation had
H identified in detail the works that were to be carried out. The works were 'renovations' works. Only the person seeking to renovate knows what is to be restored, refurbished, repaired or changed or other works by way of renovation. The quotation therefore cannot exist in vacuity. It can only be based on what
I the defendant wanted done and is evidence of a meeting of the minds. The existence of the quotation was not in dispute and it was irrelevant that the defendant did not countersign the quotation. The facts show that the plaintiff did the works and part payments were made on invoices issued based on the quotation.

[15] I am further supported by the following High Court cases where it is opined that the words 'contract in writing' should be accorded a liberal meaning and should not be restricted to a 'formal' contract (*Inovatif Engineering (M) Sdn Bhd v Nomad Engineering Sdn Bhd* [2016] MLJU 1351; [2017] 1 AMR 722 and *Poly Ritz Ventures Sdn Bhd v Westland Resources Sdn Bhd* [2020] MLJU 2016). I am in agreement with the liberal approach rather than the stringent approach of the United Kingdom cases cited by the defendant.

Second reason: Value of works claimed by plaintiff not proven

[16] The defendant next alleged that it was a 'denial of natural justice' when the adjudicator found that the works done were as mutually agreed by the parties and the value of the works is reflected in the invoices issued by the plaintiff when this is not case. In other words, the defendant disagreed with the findings made by the adjudicator. It was argued that the plaintiff had failed to discharge the burden of proof which is upon him by virtue of s 101 of the Evidence Act 1950. The defendant relied on *Tan Sri Dato' Prof Dr Lim Kok Wing & Anor v ATSA Architects Sdn Bhd* [2017] 8 MLJ 212; *Telekom Malaysia Bhd v KLK Electronic Sdn Bhd* [2019] 4 MLJ 631 and *Nanyang Development (1966) Sdn Bhd v How Swee Poh* [1970] 1 MLJ 145 for this proposition.

[17] In my view the complaint made by the defendant does not fall within the meaning of a denial of natural justice. There is no allegation of not being accorded procedural fairness but in essence is an allegation of erroneous assessment of documentary evidence. I find that the adjudicator had considered the material before him, asked the right questions and arrived at findings that in the end concluded the matter in favour of the plaintiff. The defendant's complaint that the invoices did not correspond with the quotation and that there was no evidence that the value of work done was proven are in essence questioning the correctness or merits of the adjudicator's findings. What the defendant is asking this court to exercise its appellate jurisdiction and to hold that the adjudicator erred by not adhering to s 101 of the Evidence Act 1950 in the face of sub-s 12(9) of the CIPAA which clearly states that the Evidence Act 1950 does not apply to adjudication proceedings. The cases cited by the defendant are distinguishable because they were not decided based on the provisions of the CIPAA. This complaint is therefore without merit.

Third reason: The defendant's crossclaim not considered

[18] The defendant complained that the adjudicator had made a finding that there were incomplete and defective works as evidenced by contemporaneous documents but did not allow the defendant's claim for loss of profits and loss of reputation. Reliance for this complaint is premised on the following statement made by the adjudicator at para 50 of the adjudication decision:

I find that there has indeed been a dispute between the parties with regard to the quality of the work.

[19] It is clear that the statement is not a finding of fact as claimed by the defendant but merely a finding that there is a dispute between the parties concerning quality of work. The adjudicator said that the evidence adduced by the defendant to establish the allegation of defective works was not from an independent third party but by the accountant of the defendant. The decision was based on the adjudicator's reading and the weight to be attached to a self-serving report. At paras 62–64 the adjudicator said that the dispute was not proven. The adjudicator had therefore considered the documents and made his findings. This court would be exercising appellate powers if such findings of the adjudicator are to be disturbed. The complaint is therefore without merit.

Fourth reason: The adjudicator had not acted independently or impartially

[20] The next allegation was that the adjudicator had displayed bias. This was in relation to how the adjudicator had accepted the invoices relied upon by the plaintiff for his claim and not accepted the invoices relied by the defendant for the crossclaim concerning the defective work. In my view the mere fact that the adjudicator had decided an issue cannot justify a conclusion of bias, be it apparent bias or a real danger of bias. Something more is required.

[21] In the instant case the adjudicator has considered the facts and made a decision that is not in favour of the defendant. The defendant may disagree with the adjudicator and even be convinced that the adjudication decision is wrong but that is no justification for accusing the adjudicator of having failed to act independently and impartially.

Decision on OS 7

[22] For the above reasons OS 7 is dismissed with costs.

Stay of the adjudication decision (encl 3)

[23] Stay of an adjudication decision is provided under s 16 of the CIPAA. The fact that court proceedings were pending does not entitle the aggrieved party to a stay as such circumstances provide only a basis or threshold for a party to apply for a stay and does not automatically mean that a stay should be granted as of right (*Subang Skypark Sdn Bhd v Arcradius Sdn Bhd* [2015] 11 MLJ 818; [2015] 10 CLJ 801).

[24] The principles to grant or not to grant stay under s 16 of the CIPAA are established by the Federal Court in *View Esteem Sdn Bhd v Bina Puri Holdings*

Berhad [2018] 2 MLJ 22. It was held that such application ought not to be readily allowed and caution must be exercised when doing so. Section 16 of the CIPAA allows some degree of flexibility to the courts in the exercise of its discretion to grant stay where there are clear errors or to meet the justice of the individual case. The financial capacity of the contractor to repay could be a factor but cannot be made the only consideration to grant or not to grant the stay.

[25] In applying the principles, it is my considered opinion that the defendant has failed to establish a clear and manifest error in the adjudication decision. The alleged errors are substantially made up of the defendant's dissatisfaction towards the manner the adjudicator weighed the evidence and made his findings. The plaintiff has also failed to demonstrate that the plaintiff is in no position to return the money in the event the defendant is successful in its civil suit. For these reasons I dismissed encl 3.

[26] In any event encl 3 would have no leg to stand on since OS 7 has been dismissed.

OS 4: ORDER TO ENFORCE THE ADJUDICATION DECISION

[27] I now revert to the plaintiff's originating summons for an order to enforce the adjudication decision. All the plaintiff needs to do is to satisfy this court that there is an adjudication decision that has been rendered in the plaintiff's favour, that there has been non-payment of the adjudicated sum by the date specified in the adjudication decision, and that there is no prohibition to the grant of the order that is sought. Once these matters are established as matters of fact, the order to enforce ought to be granted (*Inai Kiara Sdn Bhd v Puteri Nusantara Sdn Bhd* [2019] 2 MLJ 362; [2019] 2 CLJ 229).

[28] There is no dispute that an adjudication decision that has been rendered in the applicant's favour and that the defendant has not paid the adjudication sum within the period stipulated in the adjudication decision. Further, with the dismissal of the application to set aside the adjudication decision there is also no prohibition to grant the order sought. In the circumstances I allowed OS 4 with costs.

Plaintiff's application ('OS 4') allowed with costs; defendant's applications to stay ('encl 3') and set aside the adjudication decision ('OS 7') dismissed with costs.

Reported by Nuzul Fitrie